

No. 15984

United States
Court of Appeals
for the Ninth Circuit

THOMAS M. ROBINSON, Appellant,

vs.

THOMAS W. ELLIOT and EVELYN W.
ELLIOT, Appellees.

Transcript of Record

(In Two Volumes)

VOLUME I.

(Pages 1 to 64, inclusive)

Appeal from the United States District Court
for the District of Montana

FILED

JUN 12 1958

PAUL P. O'BRIEN, CLERK

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Appeal from the United States District Court
for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In The United States District Court, District
of Montana, Billings Division

No. 1728

THOMAS W. ELLIOT and EVELYN W. EL-
LIOT, Plaintiffs,

vs.

THOMAS M. ROBINSON, Defendant.

COMPLAINT

Plaintiffs, by their attorneys, for their complaint herein allege:

(1) This complaint is filed, and this action is instituted, pursuant to the provisions of Section 322 of the Internal Revenue Code of 1939 (U.S.C. Title 26, Sec. 322) and Section 6402 of the Internal Revenue Code of 1954 for the recovery of Federal income taxes and interest thereon, paid for the calendar years 1946, 1947, 1948, 1949, 1950, 1951, 1952 and 1953.

(2) The plaintiffs are husband and wife, residing at 502 Third Avenue East, Kalispell, Montana, and they are residents of the District of Montana.

(3) This action against Thomas M. Robinson, U. S. District Director of Internal Revenue for the District of Montana, arises under the Act of June 25, 1948, 62 Stat. 932, United States Code, Title 28, Sec. 1340.

(4) This action arises under the laws of the United States, to-wit: Section 117 of the Internal Revenue Code of 1939.

(5) The plaintiffs duly filed their Federal income tax return for the calendar year 1946 with the above-named defendant. The plaintiffs paid, on or before March 15, 1947, the amount of \$7,-350.69, the Federal income tax for 1946 shown to be due by said return.

(6) The plaintiffs duly filed with the defendant, a timely claim for refund of \$2,472.01 income tax paid for the year 1946. A true copy of said claim for refund is attached hereto and marked Exhibit "A".

(7) The plaintiffs duly filed their Federal income tax return for the calendar year 1947 with the above-named defendant. The plaintiffs paid, on or before March 15, 1948, the amount of \$8,-368.55, the Federal income tax for 1947 shown to be due by said return. On or about September 15, 1950, pursuant to a notice and demand received from the above-named defendant, the plaintiffs paid a deficiency in income tax for the calendar year 1947 in the amount of \$384.69, together with interest thereon of \$57.70, said payments being made to the above-named defendant.

(8) On or before March 15, 1951, the plaintiff duly filed with the defendant a timely claim for refund of \$2,155.70, income tax paid for the year 1947. A true copy of said claim for refund is attached hereto and marked Exhibit "B".

(9) The plaintiffs duly filed their Federal income tax return for the calendar year 1948 with the above-named defendant. The plaintiff paid, on or before March 15, 1949, the amount of \$3,791.06, the Federal income tax for 1948 shown to be due by said return.

(10) On or before March 15, 1952, the plaintiffs duly filed with the defendant a timely claim for refund of \$1,088.12, income tax paid for the year 1948. A true copy of said claim for refund is attached hereto and marked Exhibit "C".

(11) The plaintiffs duly filed their Federal income tax return for the calendar year 1949 with the above-named defendant. The plaintiffs paid, on or before March 15, 1950, the amount of \$3,167.10, the Federal income tax for 1949 shown to be due by said return.

(12) On or before April 5, 1951, the plaintiffs duly filed with the defendant a timely claim for refund of \$1,050.50, income tax paid for the year 1949. A true copy of said claim for refund is attached hereto and marked Exhibit "C". On or about March 16, 1954, the plaintiffs duly filed with the defendant an amended claim for refund of \$3,167.10, income tax paid for the year 1949. A true copy of said amended claim for refund is attached hereto and marked Exhibit "D".

(13) The plaintiffs duly filed their Federal income tax return for the calendar year 1950 with the above-named defendant. The plaintiffs paid,

on or before March 15, 1951, the amount of \$5,412.02, the Federal income tax for 1950 shown to be due by said return. On or about October 4, 1951, pursuant to a notice and demand received from the above-named defendant, the plaintiffs paid a deficiency in income tax for the calendar year 1950 in the amount of \$1,508.90, together with interest thereon of \$134.12, said payments being made to the above-named defendant.

(14) On or before March 15, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$6,920.92, income tax paid for the year 1950. A true copy of said claim for refund is attached hereto and marked Exhibit "E".

(15) The plaintiffs duly filed their Federal income tax return for the calendar year 1951 with the above-named defendant. The plaintiffs paid, on or before March 15, 1952, the amount of \$2,850.84, the Federal income tax for 1951 shown to be due by said return.

(16) On or about July 9, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$2,850.84, income tax paid for the year 1951. A true copy of said claim for refund is attached hereto and marked Exhibit "F".

(17) The plaintiffs duly filed their Federal income tax return for the calendar year 1952 with the above-named defendant. The plaintiffs paid on or before March 15, 1953, the amount of \$2,-

814.04, the Federal income tax for 1952 shown to be due by said return.

(18) On or about July 8, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$2,814.04, income tax paid for the year 1952. A true copy of said claim for refund is attached hereto and marked Exhibit "G".

(19) The plaintiffs duly filed their Federal income tax return for the calendar year 1953 with the above-named defendant. The plaintiffs paid, on or before March 15, 1954, the amount of \$3,004.94, the Federal income tax for 1953 shown to be due by said return.

(20) On or about July 8, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$3,004.94, income tax paid for the year 1953. A true copy of said claim for refund is attached hereto and marked Exhibit "H".

(21) The Commissioner of Internal Revenue disallowed the claim for refund for 1946. This complaint is filed within two years of the time of the receipt of the statutory disallowance of the claim for refund for 1946.

(22) On January 14, 1946, the plaintiffs, together with William G. Elliot, transferred to the F. A. Buttrey Company, a Montana corporation, certain real estate and a business building located thereon in Kalispell, Montana. The total consideration was payable commencing on February 1, 1946,

at the rate of \$19,000.00 a year for ten years, at which time a final payment of \$75,000.00 would be payable unless the buyer elected not to make the final payment, in which event the deed to the said property would be returned to the sellers by the escrow holder thereof. The above-described transfer was carried out pursuant to an agreement between the above-named parties. Said agreement was entitled "Lease Agreement and Purchase Option", and it was executed on January 14, 1946. Said agreement is expressly incorporated herein by reference and a true copy of said agreement is attached hereto and marked Exhibit "I". A subsequent amendment to the above agreement between the above-named parties entitled "Memorandum Agreement" was executed on February 1, 1946, and said agreement is expressly incorporated herein by reference and a true copy of said agreement is attached hereto and marked Exhibit "J".

(23) The plaintiffs were and are entitled to \$9,000.00 a year out of the \$19,000.00 yearly payments and to \$35,526.32 of the final payment of \$75,000.00. The amount received by the plaintiffs in 1946 was \$9,000.00.

(24) Prior to entering into the agreements with the F. A. Buttrey Company, referred to in paragraph (22) above, the plaintiffs owned an undivided one-half interest in the above-described property. Said property had been held for more than six months. The plaintiffs' adjusted basis for determining gain under the Internal Revenue Code

of 1939 with respect to said property was \$19,321.63 on January 14, 1946.

(25) On January 31, 1946, Thomas W. Elliot, one of the plaintiffs herein, as President of the Flathead Commercial Company, a Montana corporation, executed an "Affidavit and Statement By Seller to Purchase Under Bulk Sales Law." Said affidavit is expressly incorporated herein by reference and a true copy of said affidavit is attached hereto and marked Exhibit "K". The Flathead Commercial Company, which had for many years engaged in the dry goods and clothing business in Kalispell, Montana, sold all of its stock of merchandise and furnishings to the aforesaid F. A. Buttrey Company on or about January 31, 1946. Prior to such sale, the Flathead Commercial Company leased the property involved in the transfer set forth in paragraph (22) above. The majority of the stock of the Flathead Commercial Company was owned by the above-named plaintiffs. Said company was liquidated on or about January 31, 1946, at which time the plaintiffs retired from the business of operating and conducting a dry goods and clothing business.

(26) The Commissioner of Internal Revenue, in disallowing the 1946 claim for refund, erroneously treated the \$9,000.00 received by the plaintiffs in 1946 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(27) The Commissioner of Internal Revenue disallowed the claim for refund for 1947.

(28) The plaintiffs in 1947 received \$9,000.00 pursuant to the agreement set forth in paragraph (22) above.

(29) The Commissioner of Internal Revenue, in disallowing the 1947 claim for refund, erroneously treated the \$9,000.00 received by the plaintiffs in 1947 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(30) The Commissioner of Internal Revenue disallowed the claim for refund for 1948. This complaint is filed within two years of the time of the receipt of the statutory disallowance of the claim for refund for 1948.

(31) The plaintiffs in 1948 received \$9,000.00 pursuant to the agreements set forth in paragraph (22) above.

(32) The Commissioner of Internal Revenue, in disallowing the 1948 claim for refund, erroneously treated the \$9,000.00 received by the plaintiffs in 1948 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long-term capital gain under Section 117 of the Internal Revenue Code of 1939.

(33) The Commissioner of Internal Revenue disallowed the claim for refund for 1949. This complaint is filed within two years of the time of

the receipt of the statutory disallowance of the claim for refund for 1949.

(34) The plaintiffs in 1949 received \$9,000.00 pursuant to the agreements set forth in paragraph (22) above.

(35) The Commissioner of Internal Revenue, in disallowing the 1949 claim for refund, erroneously treated the \$9,000.00 received by the plaintiffs in 1949 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(36) The Commissioner of Internal Revenue has taken no action to date regarding the claims for refund for the years 1950, 1951, 1952 and 1953. This complaint is filed after a period of six months has elapsed since the filing of each of the refund claims for the aforesaid years.

(37) The plaintiffs, in each of the years 1950, 1951, 1952 and 1953, received \$9,000.00 pursuant to the agreements set forth in paragraph (22) above. Said amounts were erroneously reported and taxed in the plaintiffs' Federal income tax returns for 1950, 1951, 1952 and 1953 as ordinary rental income. The transfer set forth in paragraph (22) above resulted in a long term capital gain under Section 117 of the Internal Revenue Code of 1939.

(38) By virtue of the aforesaid, the defendant becomes and is indebted to the plaintiffs for \$2,472.01, income tax paid for the calendar year 1946;

and for \$2,213.40, for income tax paid together with interest paid thereon, for the calendar year 1947; and for \$1,088.12, income tax paid for the calendar year 1948; and for \$2,635.16, income tax paid for the calendar year 1949; and for \$2,844.86, income tax paid together with interest paid thereon, for the calendar year 1950; and for \$1,982.20, income tax paid for the calendar year 1951; and for \$2,084.27, income tax paid for the calendar year 1952; and for \$2,337.84, income tax paid for the calendar year 1953; which amounts have not heretofore been refunded or credited, together with interest on such amounts as provided by law.

Wherefore, the plaintiffs demand judgment against the defendant in the amount of \$17,657.86 with interest thereon as provided by law, together with the costs of this action.

Dated: May 24, 1955.

FELT, FELT & BURNETT,
/s/ By JAMES R. FELT,
Attorneys for Plaintiff.

EXHIBIT "A"

CLAIM

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

(X) Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

Exhibit "A"—(Continued)

State of Montana,
County of Flathead—ss.

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Business address: 502—3rd Avenue East.

Residence: Kalispell, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:
Helena.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from 1/1, 1946, to 12/31, 1946.

3. Character of assessment or tax: Individual Income Tax.

4. Amount of assessment: \$6,886.10; dates of payment:

5. Date stamps were purchase from the Government:

6. Amount to be refunded: \$2,472.01.

7. Amount to be abated (not applicable to income, gift, or estate taxes):

8. The time within which this claim may be legally filed expires, under section 322 (b) of Internal Revenue Code on (Unknown), 19...

The deponent verily believes that this claim should be allowed for the following reasons, as stated in Schedules and Exhibits attached hereto made a part of this claim as follows:

Exhibit "A"—(Continued)

Schedule 1	Page 1
Schedule 1-A	Page 2
Schedule 2	Page 3
Exhibit A	Page 4
Exhibit A-1	1950 Claim Page 5

* * * * *

Pa

Thomas W. and Evelyn W. Elliot
502 — 3rd Avenue East
Kalispell, Montana

Adjustments—1946

Schedule 1

Items	Returns	Additions	Deductions	Corr
1. Wages and Salaries	\$ 8,623.00			\$ 8,623.00
2. Dividends	185.16			185.16
3. Net Gain—Capital Assets	2,781.97	3,843.80		6,625.77
4. Net Gain Short Term Capital Assets	5,029.68			5,029.68
5. Buffalo Block	9,385.41		9,000.00	385.41
6. Total Income	<u>\$26,005.22</u>	<u>\$3,843.80</u>	<u>\$9,000.00</u>	<u>\$20,849.02</u>
7. Deductions:				
8. Contributions	3,665.75			3,665.75
9. Interest	725.00			725.00
10. Taxes	636.11			636.11
11. Total Deductions	<u>5,026.86</u>			<u>5,026.86</u>
12. Net Income				15,822.16

Page 2

Adjustments Explained—1946
Schedule 1-A

Item 3. Net Gain—Capital Assets	6,625.77
Previously Determined	2,781.97
Adjustment	<u>3,843.80</u>

Exhibit "A"—(Continued)

Gain on sale of property on installment basis as determined in Exhibit-A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Item 5. Buffalo Block, reported	9,385.41
Corrected	385.41
	<hr/>
Adjustment	9,000.00

See explanation for Item 3.

Note: Records could not be found as to date of filing of original return. Claim is therefore filed since the time within which this claim may be legally filed, is uncertain. Relief is also sought under provisions of Section 275 (c) Internal Revenue Code upon the same grounds, although not now so provided.

Page 3

Tax Computation—1946

Schedule 2

Net Income from Schedule No. 1	15,822.16
Less: Exemptions (2)	1,000.00
	<hr/>
	14,822.16
Combined Tentative Normal Tax and Surtax	4,646.41
Less 5%	232.32
	<hr/>
Total Tax—Corrected	4,414.09
Tax Previously Paid	6,886.10
	<hr/>
Over Assessment Claimed	2,472.01

Exhibit "A"—(Continued)

EXHIBIT A

WM. G. ELLIOT
Billings, Montana

T. W. ELLIOT
Kalispell, Montana

Net Gain—Sale of Capital Assets

Sale Price			\$265,0
Cost			
Land		\$15,000.00	
Buildings	\$68,000.00		
Improvements—1924			
1925			
1929	5,873.79		
		\$73,873.79	
Less: Depreciation Reserve			
12/31/45 per R.A.R.	\$50,054.17		
1/1 to 1/31/46	176.35		
		50,230.52	
			23,643.27
			38,6
Net Profit on Sale			\$226,3

		Installments	Reportable Profit	Taxable Profit
Payments	2/1/46	\$ 19,000.00	\$ 16,229.35	\$ 8,114.68
	2/1/47	19,000.00	16,229.35	8,114.68
	2/1/48	19,000.00	16,229.35	8,114.68
	2/1/49	19,000.00	16,229.35	8,114.68
	2/1/50	19,000.00	16,229.35	8,114.68
	2/1/51	19,000.00	16,229.35	8,114.68
	2/1/52	19,000.00	16,229.35	8,114.68
	2/1/53	19,000.00	16,229.35	8,114.68
	2/1/54	19,000.00	16,229.35	8,114.68
	2/1/55	19,000.00	16,229.35	8,114.68
	2/1/56	75,000.00	64,063.23	32,061.62
		\$265,000.00	\$226,356.73	\$113,208.42

Exhibit "A"—(Continued)

Summary				
Wm. G. Elliot—1946-55	....	\$10,000.00	\$ 4,270.88	\$42,708.80
Wm. G. Elliot—1956	.....	39,473.68	16,874.54	16,874.54
Tom Elliot—1946-55	.....	9,000.00	3,843.80	38,438.00
Tom Elliot—1956	.....	35,526.32	15,187.08	15,187.08
				\$ 113,208.42

EXHIBIT "B"

CLAIM

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

(X) Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

State of Montana,
County of Flathead—ss.

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Business address: Kalispell, Montana.

Residence: 502 — 3rd Avenue East.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:
Helena, Montana.

2. Period (if for tax reported on annual basis,

Exhibit "B"—(Continued)

prepare separate form for each taxable year) from 1/1, 1947 to 12/31, 1947.

3. Character of assessment or tax: Individual Income.

4. Amount of assessment: \$9,062.05; dates of payment: Unknown.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$2,155.70.

7. Amount to be abated (not applicable to income, gift, or estate taxes):

8. The time within which this claim may be legally filed expires, under section 322 (b) of Internal Rev. Code., on March 15, 1951.

The deponent verily believes that this claim should be allowed for the following reasons, as stated in Schedules and exhibits attached hereto made a part of this claim as follows:

Schedule 1	Page 1
Schedule 1-A	Page 2
Schedule 2	Page 3
Exhibit A	Page 4
Exhibit A-1	1950 Claim Page 5

* * * * *

Exhibit "B"—(Continued)

Thomas W. and Evelyn W. Elliot
502 — 3rd Avenue East
Kalispell, Montana

	Adjustments—1947			Page 1
	Schedule 1			
Items—Income:	Returns	Additions	Deductions	Corrected
Wages and Salaries	2,702.00			2,702.00
Dividends	15,828.16			15,828.16
Interest	375.00			375.00
Long Term Gains Exchange				
Cap. Assets	None	3,843.80		3,843.80
Short Term—Ditto	4,154.07			4,154.07
Joint Ownership	7,950.15		7,950.15	None
Totals	31,009.38	3,843.80	7,950.15	26,903.03
Deductions:				
Contributions	4,194.97		159.52	4,035.45
Interest	1,207.50			1,207.50
Taxes	642.50			642.50
Total Deductions	6,044.97		159.52	5,885.45
Net Income				21,017.58

Page 2

Adjustments Explained—1947
Schedule 1-A

Item 4. Long Term Gains	3,843.80	
Previously Reported	None	
Adjustment		3,843.80
Item 6. Joint Ownership Income	None	
Previously Reported	7,950.15	
Adjustment		7,950.15

Contributions reduced because of 15% limitations.

Exhibit "B"—(Continued)

Tax Computation—1947	
Schedule 2	
Net Income from Schedule No. 1	21,017.58
Less: Exemptions (2)	1,000.00
	20,017.58
	20,017.58
Combined Tentative Normal Tax and Surtax	7,269.84
Less: 5%	363.49
	6,906.35
Corrected Assessment	6,906.35
Tax Assessed R.A.R. 9/15/50	9,062.05
	2,155.70
Over Assessment Claimed	2,155.70

[Note: Exhibit A is the same as set out at pages 16-17.]

EXHIBIT "C"

CLAIM

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

(X) Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

State of Montana,
County of Flathead—ss.

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Business address:

Residence: 502 — 3rd Ave. East, Kalispell, Montana.

Exhibit "C"—(Continued)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Helena, Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from 1/1, 1948, to 12/31, 1948.

3. Character of assessment or tax: Individual Income Tax.

4. Amount of assessment: \$3,432.02; dates of payment: Quarterly 1948.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$1,088.12.

* * * * *

The deponent verily believes that this claim should be allowed for the following reasons:

As stated in Schedules and exhibits attached hereto and made a part of this claim as follows:

Schedule 1	Page 1
Schedule 1-A	Page 2
Schedule 2	Page 3
Exhibit A	Page 4

* * * * *

Exhibit "C"—(Continued)

CLAIM

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

(X) Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

State of Montana,
County of Flathead—ss.

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Business address:

Residence: 502 — 3rd Ave. East, Kalispell, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:
Helena, Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
1/1, 1949, to 12/31, 1949.

3. Character of assessment or tax: Individual
Income Tax.

4. Amount of assessment: \$3,167.10; dates of
payment: Quarterly 1949.

5. Date stamps were purchased from the Govern-
ment:

Exhibit "C"—(Continued)

6. Amount to be refunded: \$1,050.50.

* * * * *

The deponent verily believes that this claim should be allowed for the following reasons: As stated in Schedules and exhibits attached hereto and made a part of this claim as follows:

Schedule 1.....Page 1
 Schedule 1-APage 2
 Schedule 2Page 3
 Exhibit APage 4

* * * * *

Thomas W. and Evelyn W. Elliot
 502 — 3rd Avenue East
 Kalispell, Montana

Adjustments—1949

Schedule 1

Income	Per Return			Corrected
	As Filed	Additions	Deductions	
Wages	6,870.00			6,870.00
Dividends	3,889.60			3,889.60
Interest	1,537.59			1,537.59
Rentals	7,961.12		7,961.12	None
Net Gain—Capital Assets	1,044.00	3,845.80		4,887.80
Adjusted Gross Income	21,302.31	3,843.80	7,961.12	17,184.99
Deductions:				
Contributions	1,135.00			1,135.00
Interest	1,732.53			1,732.53
Taxes	946.14			946.14
Miscellaneous	7.20			7.20
	3,820.87			3,820.87
Net Income	17,481.44			13,364.12

Exhibit "C"—(Continued)

Adjustments Explained
Schedule 1-A

Item 4. Rentals Corrected	None
Reported	7,961.12
	<hr/>
Adjustment	7,961.12

Gain on sale of property on installment basis as determined in Exhibit-A attached hereto, is based upon facts and interpretation of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiation, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Item 5. Gain on Capital Assets—Reported	1,044.00
Adjusted	4,887.80
	<hr/>
Adjustment	3,843.80

See Explanation Above.

Item 4. Rentals Adjusted—Reported	7,961.12
Corrected	None
	<hr/>

Gain on sale of property on installment basis as determined in Exhibit-A attached hereto, is based upon facts and interpretations of a lease and option drawn on February 1, 1946.

Property was offered for sale, for \$265,000.00. After some negotiations, purchaser made a counter-offer as set out in the lease and option, to lease the property for ten years at \$19,000.00 per year, with option to purchase the property at the end of the ten-year period for \$75,000.00, or a total of \$265,000.00. Purchaser agreed to pay taxes, insurance and maintenance. Transcript of agreement is attached hereto, as Exhibit A-1.

Item 5. Net Gain Capital Assets	
Reported	1,455.03
Corrected	5,298.83
	<hr/>

See Explanation at Item 4.

Exhibit "C"—(Continued)

Tax Computation—1948

Schedule 2

Net Income Schedule No. 1	14,357.61
Less Exemptions (4)	2,400.00
	<hr/>
Taxable Net Income	11,957.61
1/2 of above	5,978.81
	<hr/>
Combined Normal & Surtax	1,354.49
Reduction	182.34
	<hr/>
	1,171.95
2 x 1171.95=Tax Due	2,343.90
Previously assessed	3,432.02
	<hr/>
Overassessment	1,088.12

Tax Computation—1949

Schedule 2

Net Income Schedule 1	13,364.12
Less Exemptions (4)	2,400.00
	<hr/>
	10,964.12
1/2 of 10,964.12	5,482.06
	<hr/>
Combined Normal & Surtax	
on above	1,225.34
Less 12% plus 68.00	167.04
	<hr/>
	1,058.30
2 x 1058.30=Total Tax	2,116.60
Tax Paid	3,167.10
	<hr/>
Overassessment	1,050.50

Exhibit "C"—(Continued)

Thomas W. and Evelyn W. Elliot
502 — 3rd Avenue East,
Kalispell, Montana

Adjustments—1948

Item Income	Per			
	Return as Filed	Additions	Deductions	Correc
1. Salaries & Wages	6,659.36			6,659
2. Dividends	4,169.60			4,169
3. Interest	1,975.00			1,975
4. Rentals	7,961.12		7,961.12	
5. Net Gain—Capital Assets	1,455.03	5,843.80		5,298
6. Adjusted Gross Income	22,220.11	3,843.80	7,961.12	18,102
Deductions:				
7. Contributions	1,094.00			1,094
8. Interest	1,597.50			1,597
9. Taxes	1,046.48			1,046
10. Miscellaneous	7.20			7
	3,745.18			3,745
Net Income	18,474.93	3,843.80	7,961.12	14,357

EXHIBIT "D"

SUPPLEMENTAL REFUND CLAIM

* * * * *

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Street address: 502 3rd Avenue North.

City, postal zone number, and State: Kalispell,
Montana.

1. District in which return (if any) was filed:
Montana.

2. Period (if for tax reported on annual basis,

Exhibit "D"—(Continued)

prepare separate form for each taxable year) from Jan. 1, 1949, to Dec. 31, 1949.

3. Kind of tax: Income.

4. Amount of assessment, \$3167.10; dates of payment: by March 15, 1950.

* * * * *

6. Amount to be refunded: \$3167.10, or such other amount as is legally refundable, plus interest.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The original refund claim previously filed claimed capital gain treatment on payments received from certain property, using the installment basis method of computing gain on the transaction.

This claim is filed to claim the right to exclude all payments received during 1949 on this transaction on the grounds that a sale occurred in 1946 and that payments received in subsequent years are not income.

For further details, reference is made to Revenue Agents Reports and other records on file with the Treasury Département.

Dated March 16, 1953.

/s/ THOMAS W. ELLIOT,

/s/ EVELYN W. ELLIOT.

EXHIBIT "E"

CLAIM

* * * * *

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Street address: 502 Third Avenue North.

City, postal zone number, and State: Kalispell,
Montana.

1. District in which return (if any) was filed:
Montana.

2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year) from
Jan. 1, 1950, to Dec. 31, 1950.

3. Kind of tax: Income.

4. Amount of assessment, Unknown; dates of
payment: March 15, 1951; November 1951.

5. Date stamps were purchased from the Gov-
ernment:

6. Amount to be refunded: Total tax paid or
such other amount as is legally refundable, plus
interest.

7. Amount to be abated (not applicable to in-
come, estate, or gift taxes):

Refund of the amount described on line 6 above
is hereby demanded together with interest as pro-
vided by law.

Thomas W. Elliot, together with William G.

Exhibit "E"—(Continued)

Elliot, sold a business building located in Kalispell, Montana, to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to said property would be returned to the sellers.

The taxpayers erroneously reported on their 1950 U. S. Income Tax Return the yearly payment of \$19,000 received in 1950 as rental income and paid tax thereon at ordinary income tax rate.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. Therefore, all payments received during 1950 are not subject to Federal income taxation. For further details, the Revenue Agent's reports and other records and documents on file with the Treasury Department concerning the above taxpayers and involving the taxable years 1946, 1947, 1948, and 1949 are expressly incorporated herein by reference.

* * * * *

EXHIBIT "F"

CLAIM

* * * * *

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Street address: 502 Third Avenue North.

City, postal zone number, and State: Kalispell,
Montana.

1. District in which return (if any) was filed:
Montana.

2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year) from
Jan. 1, 1951, to Dec. 31, 1951.

3. Kind of tax: Income.

4. Amount of assessment, \$2,850.84; dates of
payment: March 15, 1952.

5. Date stamps were purchased from the Gov-
ernment:

6. Amount to be refunded: \$2,850.84 or such
amount as is legally refundable plus interest.

7. Amount to be abated (not applicable to in-
come, estate, or gift taxes):

The claimant believes that this claim should be
allowed for the following reasons:

Refund of the amount described on line 6 above
is hereby demanded together with interest as pro-
vided by law.

Exhibit "F"—(Continued)

Thomas W. Elliot, together with William G. Elliot, sold a business building located in Kalispell, Montana, to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to said property would be returned to the sellers.

The taxpayers erroneously reported on their 1951 U. S. Income Tax Return their share of the yearly payment of \$19,000 received in 1951 as rental income and paid tax thereon at ordinary income tax rates.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. For further details, the Revenue Agent's reports and other records and documents on file with the Treasury Department concerning the above taxpayers and involving the taxable years 1946, 1947, 1948, 1949, and 1950 are expressly incorporated herein by reference.

* * * * *

EXHIBIT "G"

CLAIM

* * * * *

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Street address: 502 Third Avenue North.

City, postal zone number, and State: Kalispell,
Montana.

1. District in which return (if any) was filed:
Montana.

2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year) from
Jan. 1, 1952, to Dec. 31, 1952.

3. Kind of tax: Income.

4. Amount of assessment, \$2,814.04; dates of
payment: March 15, 1953.

5. Date stamps were purchased from the Gov-
ernment:

6. Amount to be refunded: \$2,814.04 or such
amount as is legally refundable, plus interest.

7. Amount to be abated (not applicable to in-
come, estate, or gift taxes):

The claimant believes that this claim should be
allowed for the following reasons:

Refund of the amount described on line 6 above
is hereby demanded together with interest as pro-
vided by law.

Exhibit "G"—(Continued)

Thomas W. Elliot, together with William G. Elliot, sold a business building located in Kalispell, Montana, to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to said property would be returned to the sellers.

The taxpayers erroneously reported on their 1952 U. S. Income Tax Return their share of the yearly payment of \$19,000 received in 1952 as rental income and paid tax thereon at ordinary income tax rates.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. For further details, the Revenue Agent's reports and other records and documents on file with the Treasury Department concerning the above taxpayers, and involving the taxable years 1946, 1947, 1948, 1949, and 1950 are expressly incorporated herein by reference.

* * * * *

EXHIBIT "H"

CLAIM

* * * * *

Name of taxpayer or purchaser of stamps:
Thomas W. and Evelyn W. Elliot.

Street address: 502 Third Avenue North.

City, postal zone number, and State: Kalispell,
Montana.

1. District in which return (if any) was filed:
Montana.

2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year) from
Jan. 1, 1953, to Dec. 31, 1953.

3. Kind of tax: Income.

4. Amount of assessment, \$3,004.94; dates of
payment: March 15, 1954.

5. Date stamps were purchased from the Gov-
ernment:

6. Amount to be refunded: \$3,004.94 or such
amount as is legally refundable plus interest.

7. Amount to be abated (not applicable to in-
come, estate, or gift taxes):

The claimant believes that this claim should be
allowed for the following reasons:

Refund of the amount described on line 6 above
is hereby demanded together with interest as pro-
vided by law.

Exhibit "H"—(Continued)

Thomas W. Elliot, together with William G. Elliot, sold a business building located in Kalispell, Montana, to the F. A. Buttrey Company, a Montana corporation, on January 14, 1946. The sale price was payable, commencing on Feb. 1, 1946, at the rate of \$19,000 a year for 10 years, at which time a final payment of \$75,000 was payable unless the buyer elected not to make the final payment, in which event the deed to said property would be returned to the sellers.

The taxpayers erroneously reported on their 1953 U. S. Income Tax Return their share of the yearly payment of \$19,000 received in 1953 as rental income and paid tax thereon at ordinary income tax rates.

Under the Federal income tax law, a completed sale occurred in 1946 resulting in a long term capital gain. For further details, the Revenue Agent's reports and other records and documents on file with the Treasury Department concerning the above taxpayers and involving the taxable years 1946, 1947, 1948, 1949, and 1950 are expressly incorporated herein by reference.

* * * * *

[Exhibit I—Lease Agreement and Purchase Option dated January 14, 1946, is the same as Exhibit K set out in Case No. 15983 at page 41.]

[Exhibit J—Memorandum Agreement dated February 1, 1946, is the same as Exhibit L set out in Case No. 15983 at page 54.]

EXHIBIT "K"

AFFIDAVIT AND STATEMENT BY SELLER
TO PURCHASER UNDER BULK SALES
LAW

State of Montana,
County of Flathead—ss.

T. W. Elliot, being first duly sworn on oath, deposes and says: That he is the President of the Flathead Commercial Company, a Montana corporation, which has been and is now conducting a dry goods and clothing business in the Buffalo Block on Main Street in the City of Kalispell, Flathead County, Montana, on Lots Ten (10), Eleven (11) and Twelve (12) of Block Fifty-five (55) of the original townsite of Kalispell; that in connection with the conduct of said store and business said corporation has carried a stock of merchandise and furnishings; that said Flathead Commercial Company, a corporation, has made and entered into an Agreement for the sale of all stock in trade and merchandise of said business, and that affiant makes this affidavit as President of said corporation, being thereunto duly authorized, and in compliance with the provisions of what is known as the Bulk Sales Law of the State of Montana, and particularly Section 8607, Revised Codes of Montana of 1935. That in compliance with said Law this affiant hereby certifies and declares that there are no creditors of said Flathead Commercial Company holding claims due or owing or which

Exhibit "K"—(Continued)

shall become due or owing for or on account of goods, wares, merchandise, trade fixtures, or equipment purchased upon credit, and that there are no creditors of the vendor, Flathead Commercial Company, holding any claims due or owing or which shall become due or owing for or on account of money borrowed by said Flathead Commercial Company and used in the business of said Company; and this affiant, as such officer of said corporation, hereby expressly certifies that all stocks of merchandise, fixtures and equipment now situated on said premises above referred to and covered by said sales agreement with F. A. Buttrey Company, a Montana corporation, are free of any creditors' claims whatsoever.

/s/ T. W. ELLIOT.

Subscribed and sworn to before me this 31st day of January, 1946.

[Seal] DANIEL J. KORN,
Notary Public for the State of Montana. Residing
at Kalispell, Montana. My Commission Expires
Sept. 22, 1946.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause No. 1728.]

ANSWER

Comes now the defendant, by his attorney of record, Krest Cyr, United States Attorney for the District of Montana, and in answer to plaintiffs' complaint herein:

A. Denies every allegation not admitted, qualified or otherwise specifically referred to below.

B. Further answering the petition:

1. Denies the allegations in paragraph 1 except those relating to the provisions of Section 322 of the Internal Revenue Code of 1939 admitted in other numbered paragraphs to follow.

2. Admits the allegations in paragraph 2.

3. Admits the allegations in paragraph 3.

4. Denies the allegations in paragraph 4.

5. Admits the allegations in the first sentence of paragraph 5 and denies the remaining allegations therein except to admit that the plaintiffs paid on or before March 15, 1947, the amount of \$7,200 and to allege that the balance of the amount of \$7,350.69 was paid on March 17, 1947. Defendant further alleges that \$2,264.59 of the amount of \$7,350.69, with interest of \$555.94, a total of \$2,820.53, has been repaid to the plaintiffs by statutory credit and by Treasury check.

6. Denies the allegations in paragraph 6 except to admit that on March 15, 1951, the plaintiffs filed

with the defendant a claim for refund of \$2,472.01 income tax paid for the year 1946 of which Exhibit "A" is a partial but incomplete copy, and also denies any allegations in such claim for refund not elsewhere herein admitted.

7. Admits the allegations in the first sentence of paragraph 7; admits the allegations in the second sentence of paragraph 7 except to allege that \$7,200 was paid on or before March 15, 1948, and the balance of \$1,168.55 was paid on April 26, 1948; and denies the allegations in the third sentence of paragraph 7 except to admit that a deficiency in income tax for the calendar year 1947 was assessed on October 26, 1950, in the sum of \$384.69 as tax with interest thereon of \$59.82, a total of \$444.51, which was collected by a statutory credit of an overpayment by the plaintiffs upon their 1946 income tax return.

8. Admits the allegations in paragraph 8 except to deny that Exhibit "B" is a complete copy of the original claim for refund and also to deny all allegations in the claim not elsewhere herein admitted.

9. Admits the allegations in paragraph 9 except to allege that the plaintiffs paid on March 16, 1948, only a net amount of \$3,432.02.

10. Denies the allegations in paragraph 10 except to admit that on April 5, 1951, the plaintiffs filed a claim for refund of \$1,088.12 income tax paid for the year 1948 and to admit that Exhibit "C" is an incomplete copy of such claim for refund and also

denies all allegations in such claim for refund not elsewhere herein admitted.

11. Admits the allegations in paragraph 11 except to allege that the plaintiffs paid on or before March 15, 1950, a net amount of only \$2,191.50 as federal income tax for 1949.

12. Admits the allegations in paragraph 12 except to deny that Exhibit "C" and Exhibit "D" are complete copies of the original claims, to deny all allegations in such claims for refund not elsewhere herein admitted and also to deny that the claim for refund of \$3,167.10 filed March 16, 1953, was an "amended" claim for refund.

13. Admits the allegations in paragraph 13 except to allege that the plaintiffs paid on or before March 15, 1951, the amount of \$4,127.26 and to allege that they paid deficiency interest of only \$122.20.

14. Admits the allegations in paragraph 14 except to allege that the sum of \$6,920.92 in fact was only \$5,636.16 or the "total tax paid"; denies that Exhibit "E" is a complete copy of the original claim for refund and also denies all allegations in such claim not elsewhere herein admitted.

15. Denies the allegations in paragraph 15 except to admit that the plaintiffs filed their federal income tax return for the calendar year 1951 with the defendant on March 17, 1952, at which time they made a payment of \$1,517.44 in addition to a prior payment of \$660, an aggregate payment of \$2,177.44.

16. Admits the allegations in paragraph 16 except to deny that Exhibit "F" is a complete copy of the original claim for refund and also to deny all allegations in such claim not elsewhere herein admitted.

17. Admits the allegations in paragraph 17.

18. Admits the allegations in paragraph 18 except to deny that Exhibit "G" is a complete copy of the original claim for refund and also to deny all allegations in such claim not elsewhere herein admitted.

19. Admits the allegations in paragraph 19.

20. Admits the allegations in paragraph 20 except to deny that Exhibit "H" is a complete copy of the original claim for refund and also to deny all allegations in such claim not elsewhere herein admitted.

21. Admits the allegations in the first sentence of paragraph 21 and denies the remaining allegations in such paragraph.

22. Denies the allegations in the first sentence of paragraph 22 and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in such paragraph, including the allegations relating to Exhibits "I" and "J".

23. Denies the allegations in paragraph 23 except to admit that the plaintiffs received an amount of \$9,000 in 1946.

24. Denies the allegations in paragraph 24.

25. Is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 and is without knowledge or information relating to Exhibit "K".

26. Denies the allegations in paragraph 26.

27. Admits the allegations in paragraph 27.

28. Denies the allegations in paragraph 28 except to admit that the plaintiffs received \$9,000 in 1947.

29. Denies the allegations in paragraph 29.

30. Admits the allegations in the first sentence of paragraph 30 and denies the remaining allegations in such paragraph.

31. Denies the allegations in paragraph 31 except to admit that the plaintiffs received \$9,000 in 1948.

32. Denies the allegations in paragraph 32.

33. Admits the allegations in the first sentence of paragraph 33 and denies the remaining allegations in such paragraph.

34. Denies the allegations in paragraph 34 except to admit that the plaintiffs received \$9,000 in 1949.

35. Denies the allegations in paragraph 35.

36. Admits the allegations in paragraph 36 and also alleges that the claims for refund for the years 1950, 1951, 1952 and 1953 were disallowed with statutory notice dated July 5, 1955.

37. Denies the allegations in paragraph 37 except to admit that the plaintiffs received \$9,000 in each of the years 1950, 1951, 1952 and 1953.

38. Denies the allegations in paragraph 38 except to admit that no part of the amounts therein set forth has been refunded or credited except as shown in preceding numbered paragraphs of this answer.

Affirmative Defense

39. Plaintiffs timely filed a claim for refund of \$2,155.70 of income tax paid for the calendar year 1947. Such claim was disallowed in full. Notice of such disallowance was given to the plaintiffs by the Commissioner of Internal Revenue by registered mail on July 20, 1951. More than two years from the date of mailing by registered mail of such notice of disallowance on July 20, 1951, had expired before the plaintiffs on May 27, 1955, filed their complaint and summons in the above-entitled suit. Plaintiffs' suit was begun after any recovery upon their claim for refund for 1947 was barred by provisions in Section 6532(a), Internal Revenue Code of 1954. The Court has no jurisdiction except to dismiss the pending action in so far as it relates to plaintiffs' asserted claim for the calendar year 1947.

40. The Court is requested to order a reply to the affirmative defense in paragraph 39 of this answer, as provided in Rule 7(a).

Wherefore, defendant demands judgment that

plaintiffs' complaint be dismissed, together with the costs of this action.

KREST CYR,

United States Attorney, Attor-
ney for the defendant.

/s/ FRANK M. KERR,
Assistant United States
Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause No. 1728.]

AMENDMENT TO COMPLAINT

Plaintiffs, by their attorneys, for their amend-
ment to their complaint herein allege:

1. Paragraph (22) of the Complaint is amended so that, as amended, it shall read exactly as now written with the addition of the following sentence at the end thereof: On or about November 5, 1955, the above-mentioned F. A. Buttrey Company, elected to make the agreed payment of \$75,000.00 and said sum was paid to the plaintiffs and to William G. Elliot.

2. Paragraph (30) of the Complaint is amended so that, as amended, it shall read as follows: The Commissioner of Internal Revenue has taken no action on the 1948 refund claim to the best of the plaintiffs' information and belief. This Complaint

is filed after the expiration of six months from the date of filing the 1948 refund claim.

3. Paragraph (15) of the Complaint is amended by striking out the figure \$2,850.84 and replacing it with the figure \$3,510.84 and striking out all of the words written after that figure.

4. Paragraph (16) of the Complaint is amended by striking out the figure \$2,850.84 and replacing it with the figure \$3,510.84.

5. Paragraph (24) of the Complaint is amended by striking out the figure \$19,321.63 and replacing it with the figure \$20,321.63.

Dated, June 15, 1956.

FELT, FELT & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause No. 1728.]

STIPULATION OF FACTS

1. This action is instituted pursuant to the provisions of Section 322 of the Internal Revenue Code of 1939 (U. S. C. Title 26, Sec. 322) for the recovery of Federal income taxes and interest thereon, paid for the calendar years 1946, 1947, 1948, 1949, 1950, 1951, 1952, and 1953.

2. The plaintiffs are husband and wife, residing at 502 Third Avenue East, Kalispell, Montana, and they are residents of the District of Montana.

3. This action against Thomas M. Robinson, U. S. District Director of Internal Revenue, arises under the Act of June 25, 1948, 62 Stat. 932, United States Code, Title 28, Sec. 1340.

4. The plaintiffs duly filed their Federal income tax return for the calendar year 1946 with the above-named defendant. The plaintiffs paid, on or before March 15, 1947, the amount of \$9,150.69. \$2,264.59 of the amount of \$9,150.69, with interest of \$555.94, a total of \$2,820.53, has been repaid to the plaintiffs by statutory credit and by Treasury check resulting in a net payment of tax of \$6886.10.

5. The plaintiffs filed with the defendant, a claim for refund of \$2,472.01 income tax paid for the year 1946. A true copy of said claim for refund is attached to the complaint and marked Exhibit "A", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case. Said claim for refund was filed on March 15, 1951, and therefore was not filed within the time limit required by Section 322(b) of the 1939 Internal Revenue Code.

6. The plaintiffs duly filed their Federal income tax return for the calendar year 1947 with the above-named defendant. The plaintiffs paid, on or before March 15, 1948, an amount of \$7,200.00 and on April 26, 1948 they paid \$1,168.55, a total of \$8,368.55, the Federal income tax for 1947 shown to be due by said return. On October 26, 1950, a deficiency in income tax for the calendar year 1947 was assessed by the above-named defendant in the

sum of \$384.69, together with interest thereon of \$59.82, a total of \$444.51 which was collected on said date by a statutory credit of an overpayment by the plaintiffs upon their 1946 Federal income tax return.

7. On or before March 15, 1951, the plaintiff duly filed with the defendant a timely claim for refund of \$2,155.70, income tax paid for the year 1947. A true copy of said claim for refund is attached to the complaint and marked Exhibit "B", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

8. The plaintiffs duly filed their Federal income tax return for the calendar year 1948 with the above-named defendant. The plaintiffs paid, on or before March 15, 1949, the amount of \$3,432.02.

9. On or before March 15, 1952, the plaintiffs duly filed with the defendant a timely claim for refund of \$1,088.12, income tax paid for the year 1948. A true copy of said claim for refund is attached to the complaint and marked Exhibit "C", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

10. The plaintiffs duly filed their Federal income tax return for the calendar year 1949 with the above-named defendant. The plaintiffs paid, on or before March 15, 1950, the amount of \$3,167.10, the Federal income tax for 1949 shown to be due by said return.

11. On or before April 5, 1951, the plaintiffs duly filed with the defendant a timely claim for refund of \$1,050.50, income tax paid for the year 1949. A true copy of said claim for refund is attached to the complaint and marked Exhibit "C", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case. On March 16, 1953, the plaintiffs filed with the defendant another claim for refund of \$3,167.10, income tax paid for the year 1949. Plaintiffs assert that this second claim is amendatory to the first claim. Defendant denies that it is an amended claim. A true copy of said claim for refund is attached to the Complaint and marked Exhibit "D", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

12. The plaintiffs duly filed their Federal income tax return for the calendar year 1950 with the above-named defendant. The plaintiffs paid, on or before March 15, 1951, the amount of \$5,412.02, the Federal income tax for 1950 shown to be due by said return. On or about October 4, 1951, pursuant to a notice and demand received from the above-named defendant, the plaintiffs paid a deficiency in income tax for the calendar year 1950 in the amount of \$1,508.90, together with interest thereon of \$122.20, said payments being made to the above-named defendant.

13. On or before March 15, 1954, the plaintiffs duly filed with the defendant a timely claim for

refund of \$6,920.92, income tax paid for the year 1950. A true copy of said claim for refund is attached to the complaint and marked Exhibit "E", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

14. The plaintiffs duly filed their Federal income tax return for the calendar year 1951 with the above-named defendant. The plaintiffs paid, on or before March 15, 1952, the amount of \$3510.84, as Federal income tax paid for 1951.

15. On or about July 9, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$3510.84, income tax paid for the year 1951. A true copy of said claim for refund is attached to the complaint and marked Exhibit "F", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

16. The plaintiffs duly filed their Federal income tax return for the calendar year 1952 with the above-named defendant. The plaintiffs paid on or before March 15, 1953, the amount of \$2,814.04, the Federal income tax for 1952 shown to be due by said return.

17. On or about July 8, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$2,814.04, income tax paid for the year 1952. A true copy of said claim for refund is attached to the complaint and marked Exhibit "G", except that

such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

18. The plaintiffs duly filed their Federal income tax return for the calendar year 1953 with the above-named defendant. The plaintiffs paid, on or before March 15, 1954, the amount of \$3,004.94, the Federal income tax for 1953 shown to be due by said return.

19. On or about July 8, 1954, the plaintiffs duly filed with the defendant a timely claim for refund of \$3,004.94, income tax paid for the year 1953. A true copy of said claim for refund is attached to the complaint and marked Exhibit "H", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

20. The Commissioner of Internal Revenue disallowed the claims for refund for 1949, 1950, 1951, 1952, and 1953. The complaint in this case was filed within two years of the time of the receipt of all of the statutory disallowances of the aforesaid refund claims.

21. The plaintiffs received \$9,000 in each of the years 1946 through and including 1953 under the "Lease Agreement and Purchase Option." Said amounts were reported and taxed as ordinary rental income in the plaintiffs' Federal income tax returns for each of those years.

22. Prior to entering into the "Lease Agreement

and Purchase Option", the plaintiffs owned an undivided one-half interest in the property described therein. Said property had been held by the plaintiffs for more than six months. The plaintiffs' adjusted basis for determining gain under the Internal Revenue Code of 1939 with respect to said property was \$20,321.63 on January 14, 1946.

23. If the Court holds that the "Lease Agreement and Purchase Option" constitutes, for Federal income tax purposes, a sale or a conditional sale, then in order to conserve the time of the Court it is further stipulated that the parties will submit computations of amounts of over-payment to be entered for the respective years as judgment for plaintiffs, and if the computations submitted by the parties differ in amount, the parties shall be afforded an opportunity to be heard in an argument on the date fixed by the Court and thereafter the Court will then determine the correct overpayment and enter its decision.

It is understood and agreed that any argument as to the correct computation of any overpayment shall be strictly confined to the consideration of the correct computation and shall not be used for the purpose of affording an opportunity for rehearing or reconsideration.

24. If the Court holds that the "Lease Agreement and Purchase Option" does not constitute, for Federal income tax purposes, a sale or a conditional sale, then it is further stipulated that the defendant is entitled to a judgment that the plain-

tiffs' complaint be dismissed, together with the costs of the action.

Dated June 15, 1956.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiffs.

KREST CYR,
U. S. Attorney,
/s/ By DALE F. GALLES,
Attorney for Defendant.

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause No. 1728.]

AMENDMENT TO THE STIPULATION OF FACTS

Paragraph 5 of the Stipulation of Facts is hereby amended to read as follows:

5. The plaintiffs filed with the defendant, a timely claim for refund of \$2,472.01 income tax paid for the year 1946. A true copy of said claim for refund is attached to the complaint and marked Exhibit "A", except that such copy is incomplete by reason of omission of signatures and date and it is sufficient for purposes of this case.

Paragraph 20 of the Stipulation of Facts is hereby amended to read as follows:

20. The Commissioner of Internal Revenue disallowed the claims for refund for 1946, 1949, 1950,

1951, 1952, and 1953. The complaint in this case was filed within two years of the time of the receipt of all of the statutory disallowances of the afore-said refund claims.

Dated August 6, 1956.

FELT, FELT, & BURNETT,
/s/ By JACK W. BURNETT,
Attorneys for Plaintiffs.
KREST CYR,
U. S. Attorney,
/s/ By DALE F. GALLES,
Attorney for Defendant.

[Endorsed]: Filed August 7, 1956.

[Title of District Court and Cause No. 1728.]

NOTICE OF APPEAL

Notice is hereby given that Thomas M. Robinson, the defendant named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from a decision of Judge Charles N. Pray in an opinion filed June 27, 1957.

KREST CYR,
United States Attorney,
/s/ DALE F. GALLES,
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed August 26, 1957.

[Title of District Court and Cause No. 1728.]

ORDER

Pursuant to the Application for Extension of Time of defendant, the United States of America, to perfect and docket the record on appeal herein, and good cause appearing therefor,—

It Is Now Ordered that the time within which the defendant may perfect and docket its appeal herein be, and hereby is, extended for a period of fifty (50) days.

Dated this 4th day of October, 1957.

/s/ W. J. JAMESON,
United States District Judge.

[Endorsed]: Filed October 4, 1957. Entered October 7, 1957.

In the United States District Court, District
of Montana, Billings Division

Civil No. 1728

THOMAS W. ELLIOT and EVELYN W.
ELLIOT, Plaintiffs,

vs.

THOMAS M. ROBINSON, Defendant.

JUDGMENT

This cause came on regularly to be heard on the 15th day of June, 1956. The plaintiffs appeared by

their attorneys, Messrs. James R. Felt and Jack W. Burnett, also Jerome Anderson. Plaintiff Thomas W. Elliot also appeared in person. The defendant appeared by his attorneys, Dale Galles, Assistant United States Attorney, and John A. Rees, Special Assistant to the Attorney General. Evidence, both oral and written, was submitted. Within the time allowed therefor all parties filed typewritten briefs, requested Findings of Fact, and Conclusions of Law. The Court, being fully advised in the premises, made and filed a typewritten Opinion, Findings of Fact, and Conclusions of Law.

Now, therefore, in accordance with such Findings, Conclusions, and Opinion heretofore entered and filed,

It is Ordered, Adjudged, and Decreed that the plaintiffs, Thomas W. and Evelyn W. Elliot, have and recover judgment against the defendant, Thomas M. Robinson, in the sum of \$10,436.72 with interest thereon as provided by law, and their costs allowed by law.

Done this 31st day of October, 1957.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed and Entered October 31, 1957.

[Title of District Court and Cause No. 1728.]

CERTIFICATE OF PROBABLE CAUSE

Under authority provided in 28 U.S.C. 2006, pursuant to Rule 69(b) of the Federal Rules of Civil Procedure, the Court finds that the defendant as District Director of Internal Revenue acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of taxes found to be due and owing from him to the plaintiffs in the above-entitled action for which a judgment has been entered. A certificate of probable cause should therefore be granted.

Wherefore, it is ordered that a certificate of probable cause be and the same hereby is issued and entered in the above-entitled action and the defendant, Thomas M. Robinson, District Director of Internal Revenue for the Collection District of Montana, is hereby ordered relieved from the payment of said judgment and it is ordered paid out of the proper appropriation from the United States Treasury.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed October 31, 1957.

[Title of District Court and Cause No. 1728.]

NOTICE OF APPEAL

Notice is hereby given that Thomas M. Robinson, the defendant named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above-entitled Court filed October 31, 1957.

KREST CYR,
United States Attorney,
/s/ DALE F. GALLES,
Assistant U. S. Attorney, Attorneys for Defendant.

[Endorsed]: Filed December 30, 1957.

[Title of District Court and Cause No. 1728.]

ORDER

Pursuant to the Application for Extension of Time of defendant, Thomas M. Robinson, ex parte, to file and docket the record on appeal herein, and good cause appearing therefor,—

It Is Now Ordered that the time within which the defendant may file and docket its record on appeal herein be, and hereby is, extended for a period of fifty (50) days, from the date hereof, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated this 7th day of February, 1958.

/s/ W. J. JAMESON,
United States District Judge.

[Endorsed]: Filed February 7, 1958.

[Title of District Court and Cause No. 1728.]

DOCKET ENTRIES

1955

May 25—Filed Complaint.

May 27—Issued Summons and 3 copies—Mailed to Marshal at Butte.

Jun. 29—Filed Summons—Served June 20th and 24th.

Aug. 4—Filed Stipulation granting defendant 60 days additional time to plead.

Aug. 6—Filed and entered Order granting defendant 60 days additional time to plead.

Oct. 5—Filed Answer of Defendant.

Dec. 13—Filed Plaintiff's Motion for a pre-trial conference.

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Jun. 1—Entered Order Motion granted.

Jun. 1—Entered Order case noted for trial.

Jun. 6—Entered Order case set for pre-trial conference, and for trial, on June 15, 1956, 10 A.M.

Jun. 15—Filed Consolidation for trial, with case #1727.

Jun. 15—Entered Order consolidating this case for trial with case #1727.

Jun. 15—Filed Amendment to complaint.

Jun. 15—Filed Stipulation of documentary evidence.

Jun. 15—Filed Stipulation of facts.

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- Jun. 15—Entered record of trial, 60 days for Plaintiff's brief, 30 days for defendant's brief, and 20 days for reply brief.
- July 30—Filed Reporters notes for this case and case #1727.
- July 30—Filed Reporters Transcript for this case and case #1727.
- Aug. 7—Filed Amendment to the Stipulation of Facts.
- Nov. 28—Entered Order extending time to Dec. 31, 1956 for filing of Plaintiff's Brief.
- Dec. 22—Filed Plaintiff's Brief.

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- Feb. 9—Filed Stipulation in Case 1727, to apply herein, for correction of transcript.
- Feb. 19—Filed Defendant's Brief in case #1727, to apply herein.
- Feb. 19—Filed Affidavit of service by mail.
- Mar. 12—Filed Reply Brief for Plaintiffs.
- Mar. 12—Filed Affidavit of Service by mail.
- Apr. 26—Filed Brief of Defendant in Rebuttal (Placed in file #1727).
- Apr. 26—Filed Certificate of Mailing.
- Jun. 27—Filed Opinion and Order therein, ruling in favor of Plaintiffs.
- Jun. 27—Entered Order for Judgment, etc., to be rendered in favor of Plaintiffs.
- Jun. 27—Mailed copy Opinion to Felt, Felt & Burnett, Billings, Mont., and U. S. Attorney, Billings, Mont.

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- Aug. 26—Filed Notice of Appeal by Defendant.
- Aug. 28—Mailed copy Notice of Appeal to counsel for plaintiffs.
- Oct. 4—Filed Application for extension of time to docket record on appeal, for 50 days.
- Oct. 4—Filed Order extending time for 50 days to docket record on appeal.
- Oct. 7—Entered and noted herein Order extending time for 50 days to docket record on appeal.
- Oct. 31—Defendant's proposed Findings of Fact and Conclusions of Law lodged with Clerk.
- Oct. 31—Stipulation of amounts of overpayments, filed in case #1727, William G. Elliot vs. Thomas M. Robinson, to also apply herein.
- Oct. 31—Findings of Fact and Conclusions of Law, filed in Case No. 1727, William G. Elliot vs. Thomas M. Robinson, to also apply herein.
- Oct. 31—Filed & entered Judgment for Plaintiffs and against defendant for \$10,436.72, with interest and costs.
- Oct. 31—Mailed notice of entry of Judgment to all counsel herein.
- Oct. 31—Filed Certificate of probable cause.
- Oct. 31—Filed Judgment Roll.
- Dec. 30—Filed Defendant's notice of appeal.

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- Feb. 7—Filed Defendant's application for extension of time to docket record on appeal.
- Feb. 7—Filed Order granting defendant 50 days additional time to docket record on appeal.
- Feb. 10—Entered Order granting defendant 50 days additional time to docket record on appeal.
- Mar. 25—Filed Stipulation as to contents of record on appeal (see case #1727).
- Mar. 26—Mailed Record on Appeal to Clerk U. S. Court of Appeals, San Francisco, Calif., from Clerk's office at Billings, Mont.
- Apr. 8—Filed Supplemental Stipulation as to Record on Appeal for this case and case #1727.
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[Endorsed]: No. 15984. United States Court of Appeals for the Ninth Circuit. Thomas M. Robinson, Appellant, vs. Thomas W. Elliot and Evelyn W. Elliot, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: March 28, 1958.

Docketed: April 10, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15984

THOMAS M. ROBINSON, Appellant,

vs.

THOMAS W. ELLIOT and EVELYN W. EL-
LIOT, Appellees.

STATEMENT OF POINTS UPON WHICH
DEFENDANT-APPELLANT INTENDS TO
RELY

The District Court erred in the following respects:

I.

In concluding and holding in the opinion that the plaintiffs made a sale of their property to the Buttre Company in 1946 or at any time prior to 1955; that it was so understood by both parties; and that the annual rentals, so called, were installment payments on the purchase price.

II.

In making findings of fact numbered 15, 16, 17 and 18, the last sentence in finding 11, also in not finding as a fact or concluding as a matter of law that:

a. The parties, and certainly the purchaser, did not intend to make an agreement of immediate sale in 1946;

b. No conditional sale was made;

c. The Buttrey Company was not obligated to buy the property, and it acquired no equity in such property until 1955 when the option was exercised;

d. The return as ordinary rental income by the plaintiffs-appellees of the payments which they received from the Buttrey Company bars their claims that such income should be treated as gain from the sale of a capital asset;

e. The complaints did not predicate any recovery upon an alleged sale in 1946 at a profit taxable in that year as capital gain;

f. The plaintiffs-appellees offered no proof, and there is no evidence of record, to show any promise by the Buttrey Company which had a fair market value in 1946; and

g. The absence of any proof of an election by the plaintiffs-appellees to report gain from a sale upon the installment basis precludes any capital gain treatment for years after 1946.

III.

In making conclusions of law numbered 1, 2, 3 and 4, also in not concluding and holding that formal claims for refund, Exhibits H, I and J attached to the complaint in Civil No. 1727, also Exhibits E, F, G and H attached to the complaint in Civil No. 1728, each set forth a ground at variance with and wholly different from the ground of the claim for recovery in such complaints, and that such variance

deprived the Court of jurisdiction for the years 1951 to 1953, both inclusive, in Civil No. 1727, also for the years 1950 and 1953, both inclusive, in Civil No. 1728.

IV.

In not entering judgments in defendant-appellant's favor and against the plaintiffs-appellees.

Dated: April 7, 1958.

KREST CYR,
United States Attorney for the District of Montana.

/s/ DALE F. GALLES,
Assistant U. S. Attorney for the District of Montana. Attorneys for Defendant-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 10, 1958. Paul P. O'Brien, Clerk.